

Report Information
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Negative Option Selling Plans: Current Forms Versus Existing Regulations.

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Full text

This real or potential lack of awareness casts significant doubt on the validity of the Type III contract (Lamont 1995).

Unordered Merchandise and Unsolicited Goods

Another potential rule for regulating negative option selling practices is the Postal Reorganization Act (39 U.S.C. 3009(d)), which characterizes the sale or delivery of unordered merchandise without the prior expressed request or consent of the recipient as an unfair trade practice, and many similar state statutes exist.(6) These statutes clearly prohibit offers (negative or positive option) from sellers unknown to the buyer, but are less clear when an ongoing exchange relationship exists between buyer and seller (e.g., Type II and III plans). In these plans, if a seller makes a negative option offer to a buyer by placing it with or within a bill for other products, the seller relies on their ongoing relationship to validate a claim that the buyer "knows" the seller, which fulfills the statutory requirements of the unordered merchandise rules. Although a negative option dispute could be evaluated under the unordered merchandise statutes (cf. TCI 1993), the question of whether a buyer knows a seller may depend on whether that knowledge includes being cognizant that the seller engages in negative option selling activities. This is largely a variation on the buyer awareness issue discussed previously, and would probably lead back to the principles of contract law.

Federal Trade Commission's Rules on the Use of Negative Option Plans

The most specific rule regulating negative option selling is the Use of Negative Option Plans by Sellers of Commerce (16 C.F.R. Sec425.1). The rule is administered by the FTC and was issued following public hearings in the early 1970s on whether to ban negative option selling entirely. The central issue in those hearings was if and to what extent consumers' rights were infringed on or otherwise violated by negative option selling practices. One of the more enduring set of guidelines for protecting consumer rights is contained in the Consumer Bill of Rights outlined by then President John F. Kennedy in his 1962 special message to Congress. The Consumer Bill of Rights proposes four basic rights: the right to safety, the right to be informed, the right to choose, and the right to be heard (Forbes 1987). The right to be informed and the right to choose are two consumer rights at issue in many negative option selling complaints, especially for Type III plans, which critics charge depend more on consumers' lack of awareness and inertia than on informed choice (Lamont 1995). The primary complaint and driving force behind the FTC's hearings (and subsequent rule) was the concern that negative option plans exploit a consumer's inattentiveness and tendency to procrastinate and thereby sell products without the requisite informed choice due all consumers (FTC 1970). The first eight allegations listed in the hearing

proposal focus on specific acts or omissions by negative option sellers (see the Appendix). Although seven of those allegations were supported by public testimony, the FTC dismissed them as problems with sellers being unresponsive to consumer's complaints rather than problems with the negative option method itself. The eighth allegation, that introductory and bonus merchandise had not been provided to subscribers in a timely manner, was dropped because testimony focused exclusively on two record clubs and was not considered to be an industry-wide problem (FTC 1973).

The three remaining allegations (Appendix, Items 9–11) were the core issues for determining whether negative option plans were an unfair trade practice. The first of these allegations claimed that negative option plans sold products because of a buyer's preoccupation or tendency to procrastinate (Item 9). Several negative option sellers testified that their negative option selling plans may have generated higher sales volume than a positive option system but claimed that the higher sales volume did not necessarily demonstrate the validity of the allegation. These sellers argued that subscribers had chosen to participate in these plans specifically to overcome their tendency to procrastinate and to receive books that experts deemed to be worthy selections. They also claimed subscribers fully understood how the plans worked; Book-of-the-Month Club representatives cited high reenrollment figures and pointed out that four of five subscribers declined the monthly selection. The FTC accepted the industry's defense and dismissed the opposing testimony from consumers and consumer advocates as not being relevant or as being otherwise insufficient to judge the negative option method as inherently unfair. The next allegation, that negative option plans take advantage of computer errors and postal service delivery problems and that sellers use draconian **debt collection** techniques (Item 10), also was dropped because it focused on externalities or was offset by industry testimony that precautions were being taken to avoid these types of problems in the future. The final allegation (Item 11) focuses on injury to competition. After hearing the testimony, the FTC agreed that somewhere, sometime, some subscribers had merchandise foisted on them, but, citing the lack of direct evidence of diverted sales, ruled that no definitive conclusions about the extent of that injury was possible (FTC 1973).

At the conclusion of the hearings, the FTC acknowledged that though many of the allegations were supported by the record, it would not issue a ban on negative option plans because the evidence presented had not demonstrated the plans were "oppressive to consumers" or "lacking in redeeming virtue" (FTC 1973, p. 4907). The FTC did, however, adopt a set of rules based on an earlier proposal submitted by several industry groups. These rules list specific compliance requirements for all negative option plans: disclosure of material terms of a plan, a prenotification system, and minimum time frames for prenotification and merchandise shipments. The rules also list numerous specific practices considered to be unfair or deceptive (e.g., refusal to credit returned merchandise, refusal to honor a subscriber's valid request to exit the plan) in the belief that prohibiting certain practices would curb the abuses described in the hearing record. The FTC's (1973) report also lists the actions it was not willing to take. It purposefully did not set detailed rules to govern the negative option exchange relationship: no precise definition (in terms of type size, etc.) of what constitutes clear and conspicuous disclosure was

given, nor would it require postage paid return envelopes, require that sellers offer a positive option alternative, make special provisions for minors, or require disclosure of all handling charges. The FTC's specific refusal to take these actions was based on the belief that such actions were unduly burdensome to the sellers and that other rules and laws already provided adequate safeguards.

The negative option rules were reviewed again in 1986 at which time the FTC decided the rules were still needed and in their current form did not impose an undue burden on firms using negative option selling methods. The decision to support the 1973 rules reinforced the FTC's long-standing position of allowing sellers to set the terms and conditions of their negative option plan, while the FTC retains regulatory oversight of negative option selling activities.

The FTC's next review of the negative option rules is scheduled for 1997 (Howerton 1995). Because Type I plans are no longer the dominant, almost exclusive form of negative option selling, this review will need to examine a much wider range of negative option selling issues than did the last two reviews.

Distinguishing Characteristics of Negative Option-Based Exchange

The new forms of negative option selling occur within exchange relationships that are significantly different from the traditional Type I negative option plan. In Table 1, we list six characteristics that distinguish the different types of negative option selling plans. The first three characteristics focus on the contractual principles discussed in the contract law section. It seems unlikely that the FTC would meddle with or attempt to supplant the laws of contract, so we move to an analysis of the remaining characteristics.

The second three characteristics reflect different facets of negative option selling activities, but the underlying regulatory issue is the same: the buyer's awareness that a seller will use or is using a negative option selling technique or method. Adequate disclosure is a major tenet of the current negative option rules, because the FTC places a high priority on a buyer's awareness and knowledge of a seller's negative option selling activities (Lamont 1995). For example, during the 1973 hearings, there were relatively few allegations that buyers were unaware of the seller's negative option selling activities, but those allegations were used to justify issuing certain rules and disclosure requirements.

The first of these awareness factors (Item 4) focuses on whether a buyer is aware that a seller uses or may use negative option selling techniques. In a Type I plan, the relationship is entirely negative option-based from the beginning. The buyer specifically agrees to participate in the seller's plan and should be fairly vigilant for negative option offers. The adhesion contract used in a Type II plan has the potential to make a buyer aware that a seller may make negative option offers in the future, but the contract does not specify when or at what time intervals those offers will be made to the buyer. If offers are made soon after the adhesion contract is signed, the buyer may be more likely to notice the negative option offer than if those offers are made much later, because the Type II plan buyer's vigilance will decline over time. By comparison, a buyer may be subjected to a Type III plan offer from a seller that has previously made only positive choice-based exchange offers. The buyer has no reason to expect that the seller would make such an offer, may not understand negative option methods, and even may have chosen a particular seller because the seller was not a negative option seller.

(Footnote)

3 In certain circumstances, a buyer's silence can be interpreted as acceptance. See the discussion of silence as acceptance in the contract law section.

(Footnote)

4 See Wisconsin Department of Agriculture, Trade, and Consumer Protection v. Century Communications Group (1993); Wisconsin Department of Agriculture, Trade, and Consumer Protection v. Time Warner Entertainment (1993); Time Warner Cable v. Doyle (1994); Pennsylvania v. Comcast Corp. (1994); and Illinois v. Comcast Cable Corp. (1994).

(Footnote)

5 The primary purpose of the Act is to regulate cable television rates in markets that lack adequate levels of competition (for a more complete discussion of the Act, see Allard 1993; Boudreaux 1994; Huber 1994; Robichaux 1992).

(Footnote)

6 See Wisconsin Statute Sec 241.28 (1993) and Oregon Administrative Rule 137.20.300 (1991)/

(Footnote)

7 Self-regulation also can be defined as an industry or profession's internal efforts to establish standards of quality and truthfulness in its promotional efforts (Bennett 1995). However, because the use of negative option selling crosses industry and professional boundaries, we do not discuss this form of self-regulation.

(Footnote)

8 Renewal'(or not) of the negative option portion would be independent of the ongoing positive option exchange between the buyer and seller.

(Footnote)

9 Although a satellite dish for receiving television signals or cellular telephone service may be a technologically feasible substitute today, the associated costs and/or limited availability in some areas casts doubt on their functional substitutability.

Appendix. Allegations Against Negative Option Plans

1. Failed to disclose clearly and conspicuously complete operational details of the plan.

2. Denied subscribers sufficient time to respond.

3. Substituted unordered merchandise without consent of subscriber.

4. Failed to terminate membership immediately after receipt of proper cancellation notices from subscribers.

5. (The above) caused subscribers to be billed for unordered merchandise.

6. Failed to provide a meaningful response to legitimate consumer complaints.

7. Operated such plans so that the acts and practices described above commonly occurred.

8. Failed to deliver or have delayed delivery of introductory offers or bonus merchandise.

9. Operated a merchandising technique which is inherently unfair in that it relies on exploitation of subscriber's natural preoccupation with or diversions to more important affairs, and on traits of human character such as procrastination or forgetfulness.

10. Operated a merchandising technique which is inherently unfair in that it permits sellers to take advantage of the factors listed in #9, the uncertainty of the postal service, computer errors, **debt collection** (including various

deceptive and harassing tactics).

11. Diverted to themselves business which might and probably would otherwise go to competitors who do not use such plans, causing injury to competition.

Source: Federal Trade Commission (1970, 1973)

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Calling on CSTAs.

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Integration and convergence were the buzzwords of the 1980s among users and manufacturers of computer and telecommunications equipment.

The idea of freely combining communications with data processing gave impetus to such initiatives as open systems interconnection (OSI) and the integrated services digital network.

Recently, the field of view has expanded to include applications concerned with voice as well as traditional data. Telecommunications service providers recognize that business increasingly is conducted by telephone, and many of those calls involve data processing functions such as updating an electronic diary with appointment details or entering a complex sales order.

To accommodate users that want to improve the effectiveness and control of their operations, manufacturers have responded with computer-supported telephony applications (CSTAs) that provide functional integration of computers and telephony.

At the heart of CSTA is a link between a telephone switch — typically a PBX — and a computer that allows commands and status information to be passed between them (Figure 1). This link enables both components to interwork to provide functions and services to each other. The focus to date has been on enhancing computer applications by providing commands for controlling and monitoring telephone calls. One example is an application that can monitor an extension to determine its status. When the phone rings, the system can answer the call, transfer it to another extension, set up a conference call and finally hang up — all without human intervention. Most CSTA technology is aimed at users who depend heavily on the phone to conduct business such as telesales, telemarketing and customer enquiries.

CSTAs are as varied as the businesses that use them, but can be classified into three categories: call centers, desktop applications and data-oriented applications. Call centers have groups of agents that use the telephone intensively and need ready access to computer databases. Examples include telesales, **debt collection**, directory enquiries and customer service desks. CSTA technology makes call centers more efficient and improves the quality of service (see page 32).

Users are very interested in call center applications because they usually are high-profile, revenue earning or customer service-oriented activities, where improvements in efficiency or quality can translate directly into a fatter bottom line or increased market share. Very often the benefits that CSTA technology delivers can be further enhanced through the use of voice processing devices, which can sometimes replace a human operator. A voice device can do initial caller screening, for example, if the caller has a phone with dual-tone multifrequency (DTMF) that can interact with the device. Voice processing devices also can provide information for callers from a database.

Such voice processing, when used in conjunction with CSTA, is particularly powerful. After a caller enters a personal identification number into a voice response unit to request a particular service, the call can be transferred (under application control) to an operator. The operator simultaneously receives information retrieved from a database about the caller on the operator's computer terminal. The operator also can select data from a database and then transfer the call to a voice device that will provide the information. Individually, such transactions can save seconds or minutes of an operator's time. In a busy call center that handles hundreds of calls a day, every saved second can make a substantial impact on the cost of the operation.

Will It Play in Pisa?

The use of voice processing is dependent on two factors: users' acceptance and the appropriate technology. In Europe, with its cultural and technical diversity, neither factor is automatically guaranteed. In the United Kingdom, for example, general acceptance of a voice device would be expected, particularly among the young. But DTMF telephones are only widely available in office environments. In contrast, the acceptance of a voice device in Germany or Italy would be lower.

In desktop applications, users receive enhanced telephone services through an associated computer terminal. Examples of this application type include operator support systems, desktop training and hotel systems. These applications are service-oriented and available on demand to a large user population that elects when to use them.

The third category of CSTA is data-oriented applications that are less concerned with voice calls and have more to do with accessing data such as call records stored by the PBX or data transmitted via the voice network. The applications do not have computer terminals associated with telephones. Instead, the host computer controls, and acts as a repository for, data **collection**.

All currently available CSTA links are proprietary. Common standards, however, are being developed by the European Computer Manufacturers' Association (ECMA), which coined the term CSTA, and also by the American National Standards Institute, which calls its standard the switch-to-computer application interface (SCAI). Both efforts address the same issues.

In March 1990, the ECMA standards group published the final draft of its technical report that defines the scope of CSTA. The draft defines the services that are to be available across the CSTA link and the interconnection architecture that is compatible with the seven-layer OSI model.

The services defined are those primarily concerned with basic telephony, and relate mainly to control and monitoring of the telephone switch.

Since the technical report was published, the ECMA group has been working on the communication protocol for the CSTA link.

Options being discussed include using X.25, ISDN-type (2 Mb/s) or simple V.24 for the connection between switch and computer.

Most CSTA suppliers want the standard to be ratified and implemented because it would mean independence from bilateral partners, simplified implementation of CSTA products, reduced support and maintenance costs, improved portability of products, and an improved situation for customers.

Some suppliers, such as Digital Equipment Corp., are committed to moving to the standard as soon as possible. Others, however, have indicated that they will alter existing products only if their competitors do. Broad acceptance is likely, however, since expected newcomers to the CSTA market such as Alcatel and Ericsson will closely conform to the emerging standard.

Nevertheless, some differences will remain since PBX manufacturers will want to differentiate their products by providing additional proprietary functions and services. The CSTA standard should provide a mechanism that allows manufacturers to do this in a relatively controlled way.

Ratification of the draft standard by participants in the ECMA working group is expected by the end of next year. The standard does not address the functionality or characteristics of the application programming interface (API) that computer vendors provide to assist system builders with development. However, the functions available at the API will obviously be determined by those available over the CSTA link.

The APIs available today include DEC's CIT, Siemen's telephony application system (TELAS) and IBM's CallPath Services. Manufacturers expect these proprietary products to remain outside the scope of the standards work for the foreseeable future. In the short term, this factor is not expected to be a barrier to user acceptance of the technology. In the longer term, however, demands for application portability may pressure manufacturers to introduce a standard API or access method.

Come Together

Because of the importance of voice-data integration several strategic alliances have been formed between the major manufacturers of computer and PBX equipment to develop CSTA products. Currently, these relationships are bilateral agreements that provide the computer manufacturers that develop the APIs with information about PBX manufacturers' CSTA links.

In this way, computer vendors can support particular PBXs with their APIs and provide PBX suppliers with access to computer platforms needed to develop applications.

DEC originated the concept of CSTA in 1987 when its plans for computer integrated telephony (CIT) were announced. Working in partnership with Mitel, DEC developed its VAX-based CIT programming interface, which was introduced in 1989. Since then, DEC has announced joint development programs with Northern Telecom, Siemens and, most recently, AT&T to provide connectivity between the DEC VAX and Northern Telecom's Meridian 1 PBX, Siemens' Hicom 300 PBX and AT&T's Definity PBX. DEC wants to work with other PBX vendors and possibly automatic call distribution (ACD) vendors to connect to the widest range of switches for which CSTA-type links exist.

DEC's VAX CIT is currently up to Version 2.0, and the company plans to enhance it further as new PBX functions become

available. In addition, an Ultrix (Unix) version is expected in 1991. Mitel was the first PBX supplier to produce a CSTA-type host command interface (HCI), which supported the connection of a computer to its SX200 and SX2000 PBXs. With DEC, Mitel has been active in the ECMA and ANSI standards groups. Its approach has been, "You tell us what you want and we'll do it." The result of this attitude is a functionally rich HCI command set. Future developments will include access to PBX maintenance function (moves and changes), control of ACD-type call queues and caller identification.

Mitel, unlike other PBX suppliers, also is introducing its own application development tool kit based on a 386 PC Unix machine to eventually provide a complete CSTA package, consisting of a PBX, host computer and application software platforms that can be customized by users.

Northern Telecom was another early entrant into the CSTA market with its LAP link for the SL-1 (Meridian), also called the Meridian link. It is currently being approved and will be introduced in all European countries during the first half of next year. Right now it is available for testing and certification.

Northern Telecom has bilateral arrangements with both DEC and IBM that have led to supported links to these manufacturers' computers. Similar agreements exist with at least one other major computer vendor.

Northern Telecom is a major participant in the ECMA CSTA group. The company favors open standards, which it sees as being in the best interest of customers. However, when the standard is ratified, the company would comply only if other vendors do, and would, nevertheless, continue to develop new functions as the market demands them.

Siemens' Hicom is another PBX with a CSTA-type link called the application connectivity link (ACL). Siemens' strategy is to form partnerships with computer vendors and third-party software developers to promote CSTA developments. The company has relationships with DEC and IBM, which both provide APIs that support Hicom. Siemens also is working with Hewlett-Packard and Unisys, in addition to other unnamed vendors. Through its associated computer company Siemens-Nixdorf, Siemens also markets its own API, TELAS, which is a Senix-based (Siemens-Nixdorf implementation of Unix) product. TELAS also is described as being similar to DEC's CIT, but with additional functionality such as data entry through telephone sets.

Siemens claims that Hicom is different from other PBXs because of its integral service processors that provide additional functionality such as data entry via telephone, integrated voice processing and PBX statistics provision. Access to these services will be available via ACL in the future, but it will be up to computer vendors to provide access in their APIs.

IBM recently announced CallPath services architecture, its version of a CSTA API, for the IBM AS/400. IBM also revealed its plan to develop the same capability for the S/370 and PS/2 systems. At the same time, the company announced agreements with Rolm, Northern Telecom, Siemens and AT&T to support CallPath on their respective PBXs.

Also announced was the IBM Com300 PBX, which is a repackaged Siemens Hicom that IBM will sell in a number of European countries.

CallPath and Com300 were introduced under the banner of

voice-enhanced applications, which signals IBM's intention to market the products as integrated solutions.

The entry of IBM into the CSTA market is already helping to raise awareness and stimulate interest among potential users and vendors of software packages whose applications could be enhanced with CSTA capabilities.

Alcatel has been silent on the issue of CSTA. An informed source, however, has acknowledged that "Alcatel will commit to CSTA architecture during the first half of 1991." No further details are available, but it is likely that links to a number of computer platforms will be announced then.

Hewlett-Packard has been very active in the U.S. market for CSTA. The company is working with Northern Telecom to implement its applied computer telephony (ACT) platform. Due to current European telecommunications limitations, ACT initially will be available on a restricted basis in Europe.

Hewlett-Packard is holding discussions with other PBX vendors, but will wait to see how the market develops before committing to expensive bilateral developments. The company has invested heavily in the standards process and is keen to see a standard CSTA interface emerge that will reduce the cost of full-scale market entry.

Unisys has been working on integrated voice-data products for a while, but has not yet announced a European product. It is, however, known to be particularly interested in the market for enhanced public network services provided by PTTs. It also is working on a Unix-based adjunct system that will provide services to a PBX. However, it is unclear whether any of these developments will conform to the CSTA concept.

AT&T has introduced an adjunct switch application interface for its Definity PBX. It is an open interface based on ISDN and other OSI standards. AT&T has development agreements with a number of computer vendors, including DEC and Stratus, which will both support AT&T's PBX with programming interfaces.

Other suppliers are known to be developing a CSTA capability.

Ericsson announced its intention to support CSTA on its MD110 integrated services PBX, but has given no indications as yet of the expected time frame. Tandem and Stratus, the fault tolerant computer manufacturers, also have CSTA plans.

Another class of suppliers thought to be active in the CSTA area are ACD manufacturers such as Aspect, which already has a proprietary host computer link, and Datapoint.

PBX and computer suppliers tend to develop links to as many complementary products as possible. It is a necessary strategy to ensure the widest possible market for their products. It also is, however, an expensive business, since each proprietary interface must be developed and maintained separately. The main burden falls on computer manufacturers that must produce different versions of their APIs for each PBX.

Manufacturers recognize that it is not enough to produce CSTA links and APIs. What the market wants is applications that use this technology. To facilitate development of applications, vendors are increasingly forging relationships with consultancies and software houses that understand both the technology and the application needs of businesses.

The Future

When questioned about future developments, manufacturers

divided themselves into two camps: technical innovators and market followers (see page 34). Technical innovators want the CSTA standard expanded to cater to increased functionality and capabilities. These companies tend to be the most advanced in marketing their products and already have applications available. Market followers prefer to wait and see how the CSTA market develops before enhancing their products. Suppliers are optimistic about the future and report increasing marketplace awareness of CSTA. Users in the finance sector, public utilities, local government and distribution are particularly interested. The experience of Grant Broster at Mitel is common. He finds that users are still fairly uneducated about CSTA, but once they understand the general concept, they immediately recognize possibilities for applications within their organizations.

A key factor is the ease with which CSTA features can be translated into measurable business benefits. It is significant that within organizations it is the end users, those people running customer service desks, **debt collection** or telesales operations, who are most excited about the possibilities available with CSTA.

In early 1989, Enator Ltd. predicted that by the mid-1990s the European market for CSTA-related hardware and software would be worth more than 500 million pounds (\$980 million). Today, as telecommunications and computer vendors continue to enter the market, and the market itself wakes up, that possibility appears to be one step closer.

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